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ABSTRACT

Because of the United States Court of Appeal's ruling ("Quincy Cable TV vs. Federal Communications Commission") that government regulation of what cable television stations can broadcast violates their First Amendment rights, a number of consequences have arisen concerning what cable stations are required to broadcast (must-carry rules), and how much power and monopoly they can have. Cable stations were originally intended to retransmit local programming to areas that were too remote to pick up regular television signals, but protests were filed in 1980 to remove restrictions on cable programing on the basis that such regulations violate the stations' freedom of speech. The court handed down the "Quincy" decision based on the idea that cable stations have competition and could not form monopolies, but this has not been the case in several areas of the country, where one or two services have dominated viewer services, and as a consequence have blocked out the local viewers' ability to receive local public television, unless the cable service they subscribe to carries it. Solutions, such as the requirement that cable stations install A/B switches that would allow viewers to switch off cable television and receive public television, have not been successful, due to problems with quality reception of local channels without cable, and viewer apathy to public television. Such problems may ultimately reduce public funding for educational television, and cause it to finally collapse. (JC)

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# MUST-CARRY AND PUBLIC BROADCASTING

Elizabeth K. Davenport

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Must-Carry and Public Broadcasting

Introduction

On July 19, 1985 in the Quincy Cable TV v. Federal Communications Commission (Quincy),[1] the United States Court of Appeals for the District of Columbia held that the FCC's regulations requiring cable television operators, upon request and without compensation, to transmit to their subscribers every over-the-air television signal that was "significantly viewed in the community or otherwise considered local (must carry)"[2] under the Federal Communications Act of 1934, as amended[3] violated the First Amendment of the United States Constitution.

This paper will analyze the effect of this case and the subsequent new must-carry cable regulations on both public television stations and cable television systems. A brief history of the must-carry rule and cable will also be provided. Finally, this author will analyze the new must-carry requirements and their possible effect on public television stations.

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[1]768 F. 3d 1434 (1985).

[2]47 C.F.R. §§ 76.57-76.61 (1985).

[3]768 F. 2d 1434 (1985).

Cable and Must-Carry

Cable television developed in the late 1940's and early 1950's to fill a void in broadcast television service in rural and mid-sized communities caused by the Federal Communication Commission's (FCC's) 1948 freeze in the processing of new television applications.[4] The first cable system began operation in 1949.[5] The next year, the first commercial cable system was constructed in Lansford, Pennsylvania.[6] By 1952 seventy community television (CATV) systems served thousands of subscribers. By the end of the 1950's, cable television had spread significantly with approximately 550 systems providing television reception to thousands of subscribers.[7]

During its initial growth period, cable television service acted solely as a retransmitter of broadcast television signals from local or nearby markets. This growth went unrestricted by Federal or state regulations.

The FCC's first formal statement on cable television and its jurisdiction over it came in 1958 in Frontier Broadcasting v. Collier. In the late 1950's, local broadcasters feared that

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[4]13 Fed. Reg. 1948. This policy created a scarcity of broadcast outlets because technical and economic problems hampered UHF development in small communities.

[5]Id.

[6]C. Ferris, F. Lloyd, and T. Casey, Cable Television Law, p. 5-6 (1984).

[7]Id.

competition with cable operators would fragment their audiences, resulting in a loss of advertising revenue and ultimately leading to the demise of local stations. In Frontier Broadcasting, the FCC had before it a complaint brought by broadcast licensees which requested "that the Commission exercise jurisdiction over such systems as common carriers." The Commission, at that time, refused to take jurisdiction over cable on the ground that its power to do so was in question and that it did not feel that the impact of cable television at the time was sufficient to invoke its discretionary jurisdiction.[8]

During 1965, in the First Report and Order,[9] the FCC first imposed local broadcast signal carriage requirements on cable television systems.[10] These rules were designed on the theory that "community antenna television acts as a supplement rather than a substitute for off-the-air television services."[11] The underlining purpose for the rule was to prevent unfair competition between cable television systems and local broadcast audiences. The FCC stated:

> Because it is inconsistent with the concept of CATV as a supplementary service because we consider it an

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[8]24 FCC 251, 16 RR 1005 (1958).

[9]First Report and Order in Dockets 14985 and 15233, 38 FCC (1965).

[10]Id.

[11]Notice of Inquiry and Notice of Proposed Rulemaking Docket 15971, 1 FCC 2d 453 (1965).

> unreasonable restriction upon the local station's ability to compete, and because it is patently destructive of the goals we seek in allocating television channels to different areas and communities, we believe that a CATV system's failure to carry the signal of a local station is inherently contrary to the public interest. Only if we were persuaded that the overall impact of CATV competition upon broadcasting would be entirely negligible could we consider countenancing such a practice.[12]

That next year, the FCC in its Second Report and Order[13] asserted jurisdiction over all cable systems and imposed must-carry requirements. In 1966 the FCC began regulation of CATV limiting its jurisdiction to five areas:

1. jurisdiction of regulatory power between the commission and local authorities;

2. requiring cable systems to render so-called "non-duplication" programming protection to local stations;

3. composing affirmative obligations on CATV systems to initiate their own programming and to make available to the public so-called; access channels;

4. imposition of regulations upon cable systems similar to those placed on radio stations; and

5. regulation of cable importation of distant signals and imposition of requirements for mandatory signal carriage.[14]

The must-carry signal rules were upheld by the Eighth Circuit

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[12] Id.

[13] Second Report and Order Dockets 14985, 15233 and 15971, 2 FCC 2d 725, 728 (1966).

[14] Id.

Court of Appeals in Black Hills Video Corp. v. FCC[15] as valid efforts to preserve local television broadcasting.[16] The Court found that the rules did not violate the First Amendment right of free speech or constitute a taking without compensation in violation of the Fifth Amendment.[17] In holding that there was no First Amendment violation, the Court relied on National Broadcasting Co. v.United States,[18] in which the Supreme Court, in the context of radio broadcasting, held that a denial of a broadcast license for failure to satisfy the requisite public interest standard was not a denial of free speech.

The mandatory carriage rules adopted in 1972 as part of the FCC's Cable Television Report and Order,[19] first introduced the concepts of "market-size" and "significant viewership" as a basis for determining must-carry status. "Market size" was for must-carry purposes an indicator of the ability of a station to withstand competition.[20] "Significantly viewed" stations were defined as out-of-market network affiliates obtaining at least a two percent share of the viewing hours in television homes in the community

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[15] 399 F. 2d 69 (8th Cir. 1968).

[16] Id.

[17] Id.

[18] 319 U.S. 190 (1943).

[19] 36 FCC 2d 143 reco. 36 FCC 2d (1972) affd. sub nom. American Civil Liberties v. FCC, 523, F. 2d 1344 (9th Cir. 1975).

[20] 47 CFR §§ 76.57-761.

and having a five percent net weekly circulation.[21] This rule was amended in 1975 to permit stations to demonstrate "significantly viewed" status on the basis of country-wide rather than community-by-community audiences.[22]

On July 22, 1980, the Commission adopted the final Report and Order[23] ending the FCC's regulation of the importation of cable distant signal carriage. In terminating these regulations, the FCC found that the conclusions reached in the Economic Inquiry[24] and the data collected in the 1979 Reports[25] had not been refuted by arguments submitted by individuals and organizations who had participated in the rulemaking proceedings. The FCC concluded that "elimination of the distant signal carriage and syndication exclusivity rules will enhance consumer welfare by promoting competition in both the economic marketplace and the marketplace

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[21]Id. at 175.

[22]Id.

[23]Final Report and Order Nos. 20988 and 21284, 79 FCC 2d 663 (1980).

[24]Notice of Inquiry in Docket 21284, 65 FCC 2d 9 (1977); 71 FCC 2d 632 (1979).

[25]Notice of Proposed Rulemaking in dockets 10988 and 21284, 71 FCC 2d 1004 (1979).

of idea."[26] After the FCC eliminated its distant signal and syndicated exclusivity rules, the must-carry requirements constituted one of the few remaining restrictions on cable operators.[27]

By 1980 the must-carry requirement had become increasingly controversial. In that year, the Turner Broadcasting Systems Inc. (TBS) filed a petition for rulemaking to eliminate these rules.[28] TBS argued that the conclusion of the Economic Report, the basis for the elimination of the syndication and exclusivity and distant cable rules, were also the basis for the elimination of must-carry requirements.[29] TBS also claimed that the must-carry restraints were in violation of the First Amendment rights of cable operators and therefore, constitutionally insupportable.[30] Simultaneously, Quincy Cable TV, which had been fined $5,000 for failing to broadcast a must-carry signal had raised the same issues. Commissioner Ann Jones, in dissenting from the Commission's Quincy Cable[31] decision, noted that the position that the cable operator was constitutionally entitled to use its limited channel capacity to provide programming of its own choosing "may be

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[26]Economic Report 645-46.

[27]Id. at 714.

[28]Petition for Rulemaking to Delete the Cable "Must-Carry" Rules, RM-3786 (October 15, 1980). Hereafter cited as TBS Petition.

[29]Id.

[30]Id.

[31]Quincy Cable TV Inc., 53 R.R. 2d 201 (1983).

correct" and that upon judicial review "it may ultimately succeed in convincing the reviewing court that the regulation here in question is without rational justification and/or constitutional."[32]

In December, 1983, TBS filed a petition with the U.S. Court of Appeals for the District of Columbia requesting that the Court determine whether the Commission's failure to act on the TBS 1980 petition for rulemaking constituted agency action was unlawfully withheld or unreasonably delayed.[33] Quincy Cable TV also appealed its FCC fine of $5,000 for dropping two Spokane stations' must-carry signals to the same court.[34]

The Quincy Decision

The Court decided to hear both cases with individual arguments being heard on the same day. In stating its decision, the Court of Appeals examined the history of the Commission's regulation of cable, with particular emphasis on the First Report and Order and the 1972 Cable Television Report and Order whose avowed purpose was to assure the local broadcasters' continued viability by providing for cable carriage of local stations and limiting carriage of distant signals. The Court noted that:

> [A]t some point the goal of preserving localism becomes undifferentiated protectionism. Until the Commission

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[32]Id.

[33]Turner Broadcasting System, Inc. FCC, No 83-2050 (D.C. Cir.) (filed October 4, 1983).

[34]Quincy Cable TV Inc. b. FCC (D.C. Cir No. 82-1283).

> makes some effort to demonstrate to the contrary, the blunderbuss approach of the rules in their current form makes inescapable conclusion that the point has passed.[35]

After hearing arguments by both parties, the Court combined the appeal of Turner Broadcasting System of the FCC refusal to reconsider the legality of must-carry requirement and the Quincy Cable TV Inc. appeal of its $5,000 fine for dropping the signals of Spokane stations.[36] The Court said:

> With respect to Petitioner Quincy, we vacate the order requiring compliance with the must-carry rules and imposing a fine for its failure to do so. With respect to Petitioner TBS, we vacate the (FCC) order that affirmed the constitutionality of the rules.[37]

The Court, in a footnote, discussed the First Amendment consequences of the "must-carry" requirements.

> Especially troubling is that the rules apply with equal force regardless of intrusion on First Amendment freedoms. They draw no distinction between cable systems that carry 100 signals and those that carry. . . . Nor do they distinguish between cable systems that are saturated with must-carry signals and those that are not (and) the waiver procedure has been demonstrably insensitive to these concerns.[38]

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[35] 768 F. 2d at 1462 (1985).

[36] Id. at 1434 (1985).

[37] Id.

[38] Id. at 1462 FN 55 (1985).

It was the Court's opinion that when government infringes on First Amendment rights, it must "demonstrate that such regulation is narrowly tailored to serve substantial interest."[39] After examination of the purposes and the effects of the "must-carry rules," the Court concluded "that the Commission had failed to carry this burden."[40] The court said:

> After the passage of nearly two decades, and despite its demonstrated capacity to do so, the Commission has failed entirely to determine whether the evil the rule seeks to correct is real or merely a fanciful threat. Moreover, because the must-carry rules indiscriminately sweep into their protective gambit, each and every broadcaster, whether or not that protection in fact serves the asserted interest of assuring an adequate amount of local broadcasting in the community, the rules are insufficiently tailored to justify their substantial interference with First Amendment rights.[41]

The Court was critical of the FCC for requiring carriage of every "local or significantly viewed signal irrespective of the number of must-carry channels already being transmitted, the degree of programming duplication, or the channel capacity of the system."[42] The Court was also critical of the FCC for not reexamining the purpose or the need for must-carry requirements even though it had recently deregulated the television and radio industry in what the Court called "a burst of deregulatory activity unparalleled

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[39]Id. at 1457 (1985).

[40]Id. at 1453 (1985).

[41]Id. at 1457 (1985).

[42]Id. at 1453 (1985).

in (FCC's) history--including doing away with syndicated exclusivity and distant signal restrictions."

> The Commission has repeatedly repromulgated and fine-tuned the must-carry rules. It has, however, never reconsidered or seriously questioned the elaborate and concededly speculative premise on which its economic defense of the rule rests. This approach is in sharp contrast to the Commission's treatment of several other components of the regulatory framework imposed in the early years of its regulation of cable television.

Although the Court accepted the premise that "scarce spectrum space is a legitimate concept in the regulation of broadcasting, it noted that in some cases it was an infringement on First Amendment guarantees and its rationale" has no place in the evaluation of the government's regulation of cable television. Economic scarcity arguments in efforts to regulate cable "rests on the entirely unproven--and doubtful--assumption that cable operators are in the position to exact monopolistic charges." Tendency toward "monopoly, if present at all, may will be attributable more to governmental action--particularly the municipal franchising process--than to any natural phenomenon."[43] The Court said that the stringing of coaxial cables above city streets:

> may well warrant some governmental regulation . . . but hardly does it follow that such regulation could extend to controlling the nature of the programming that is conveyed . . . in light of virtually unlimited channel capacity, the standard for First Amendment review reserved for occupants of the physical scarce airwaves is plainly inapplicable.

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[43] Id.

It was the Court's ultimate belief that:

> (t)he must-carry rule coerced speech;they require the operator to carry the signals of local broadcasters regardless of their content and irrespective of whether the operator considers them appropriate. . . . Injury stems from the substantial limitations the rules work on the operator's otherwise broad discretion to select the programming it offers its subscriber. . . . Although the goal of the rules--preserving local broadcasting--can be viewed as unrelated to the suppression or protection of any particular set of ideas, the rules nonetheless profoundly affect values that lie near the heart of the First Amendment. They favor one group or speaker over another. They severely infringe on editorial discretion. And most importantly, if a system's channel capacity is substantially or compelling occupied by mandatory signals, the rules prevent cable programmers from reaching their intended audience even if that result directly contravenes the preference of cable subscriber. The Commission considers the desires of cable subscribers to be irrelevant to the application of the rules. The conscious disregard of the subscribers' viewing preference is difficult, if not impossible, to reconcile with the Supreme Court's repeated admonition that the interest of viewers should be considered paramount.[44]

Aftermath

In the wake of the U.S. Court of Appeals' decision declaring the FCC's must-carry rules unconstitutional, a major confrontation between the television broadcasters and cable industries began to develop. In accordance with the Quincy decision, the FCC suspended enforcement of its requirements for cable television systems set forth in 76.52 and 76.61 of its rules effective July 19, 1985; the FCC decided not to appeal this ruling.[45] In response to the Court's decision, the FCC, in a split decision, stated "at

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[44]Id.

[45]Public Notice (August 2, 1985).

this point, [it] cannot conceive of a new set of rules which would accomplish the commission's policy goals and would meet the constitutional test outlined in the Quincy decision."[46] The National Association of Broadcasters and others sought Supreme Court review. The reasons were obvious. Cable and the must-carry requirements had been a boon to UHF broadcasters, making their higher frequency signals as easy to receive as those of any VHF station.[47] The Quincy decision, made local cable operators free to fill their channels with anything that would help them attract the most subscribers. The consequences of this freedom was the possibility of putting a number of UHF stations out of business and consign some public television stations (the majority of them being UHF) to extinction. Because the repeal of the must-carry rules directly effect public television stations, the National Association of Public Television Stations (NAPTS), the Public Broadcasting Service (PBS), and the Corporation for Public Broadcasting (CPB) and other commercial and public television entities petitioned the FCC on October 15, 1985. They requested that cable television systems be required to retransmit all local public television stations in the communities those cable systems serve, citing the unique public and government interests in

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[46] Id.

[47] 50 FR 48232 (September 1985).

maintaining public television. These petitions asked the Commission to adopt new must-carry rules that would meet the constitutional concerns raised by the court.

In the NAPTS statement released to the press on October 15, 1985, the NAPTS President Peter M. Fannon outlined the reason for the redrafting the must-carry rules:

> Public television is American public's television; they've paid for it, they use it everyday in school classrooms and at home, and they should be certain of having access to it. . . . In barely a month since the must-carry rules were eliminated two local public television stations have been dropped--in Tacoma, Washington and New York City. Others have been notified that they may be dropped or will have to pay the cable company to be carried. This is an intolerable situation for public television, whose not-for-profit educational and public program services reflect citizen, public government investment of over $800 million per year. We hope that the cable industry will recognize the significance of public television to the diversity of television programming and what we are trying to do with this petition.[48]

In response to these rulemaking petitions, the FCC initiated a Notice of Inquiry and Notice of Proposed Rulemaking in November 1985.[49] The commission noted that:

> [it]is aware that the Quincy decision has caused considerable concern and uncertainty in both the broadcast and cable industries. Accordingly, we believe that it is appropriate and desirable to initiate both an inquiry and rulemaking concerning this subject. It also appears appropriate to examine the communication policy

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[48]NAPTS Statement released to the press on October 15, 1985 regarding Public Broadcasting Petition to FCC for Must Carry Rules (herein referred to as NAPTS Statement.

[49]Carriage of Television Broadcast Signals by Cable Television Systems 150 Fed. 48232 (Nov. 22, 1985).

implications of cable's compulsory license in light of the Quincy decision.[50]

Eighty-five parties filed comments and twenty-eight parties filed replies in response to the Notice.[51] In addition, many members of Congress submitted letters concerning this matter and many other parties filed informal comments.

On March 21, 1986, several of the major broadcast and cable industry associations submitted an "industry agreement" to the Commission for consideration as a plan for new must-carry rules.[52] In response to the filing of the industry agreement, the Commission issued an Order,[53] requesting additional comment on the must-carry matter and the industry proposals in particular. Sixty-four parties filed formal comments addressing the industry agreement.[54]

On August 7, 1986, the Commission adopted a two-part regulatory program that eventually will eliminate the need for cable television mandatory signal carriage regulation. The first part of the new

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[50]50 Fed. Reg. at 48233.

[51]In the Matter of Amendment of Part 76 of the commission's Rules Concerning Carriage of Television Broadcast Signals MM Docket 85-34. Appendix A.

[52]The parties endorsing the agreement were the National Association of Broadcasters (NAB), the Association of Independent Television Stations (INS), the Television Operators Caucus (TOC), the National Cable Television Association (NCTA), and the community Antenna association (CATA).

[53]51 FR 11073 (March 25 1968).

[54]In the Matter of Part 76 of the commission Rules concerning carriage for Television Broadcast Signals by Cable Television Systems Report and Order, Released November 1986 at ¶ .

regulatory program will require cable systems to offer subscribers input selector switches for use with antennas and to conduct a consumer education program concerning the purpose of, and need for, maintaining off-the-air reception capability.[55] The second part of this plan consists of interim must-carry rules that are intended to provide an orderly transition to the elimination of must-carry regulations. Thus, the new must-carry rules will expire at the end of a five year transition period. The interim must-carry rules are a modified version of the proposed industry agreement that was filed jointly by several of the major broadcast and cable trade associations.[56] The modifications to the industry agreement include specific protections for noncommercial educational and new commercial broadcast stations. The new regulatory program is designed to maximize consumers' program choices by developing cable subscribers' awareness of the need for the capability to receive off-the-air broadcast signals independent of their cable service. The real heart of the rules is a requirement that cable equipment provide subscribers the option of selecting either off-the-air signals or cable signals . . . using a "A/B switch." This is intended to get around the difficulty many cable viewers

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[55]Id. at 23 ¶ 140.

[56]Id. at 23 ¶ 143.

presently face of having to disconnect the cable if they want to watch off the air and thus assures that a cable installation doesn't impede subscriber access to local signals.[57]

Cable operators will have to provide this selector switch free to all new subscribers and must offer it to existing subscribers at cost. They must also take steps to inform subscribers about the switches the possible need for antennas for off-air reception, and what local stations are not carried on the cable.[58]

Under the new scheme, must-carry is secondary and more important, temporary for only five years. Its sole purpose is to allow a transition period while the A/B switch equipment is put in place.[59] The actual carriage requirements during this interim period will vary, depending on the usable channel capacity of the system.

In order to determine eligibility, station owners have to determine two things:

- What stations are eligible for must-carry, and
- How many broadcast channels the cable system must be ready to carry. Station owners must first list all stations licensed in communities within 50 miles of the cable system's headend, plus public TV translators (100 watts or more) operating in the cable community. Then

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[57] Id. at 23 ¶ 140.

[58] Id. at 24 ¶ 140.

[59] Id.

eliminate any commercial stations that:

- Have been operating for more than one year, and,
- Do not have an average share of total viewing hours of 2 percent and a net weekly circulation of 5 percent in non-cable homes in the county where the cable system is located.

They must also eliminate any stations that are considered "distant signals" for copyright purposes.

Stations owners must then determine how many must-carry signals the cable system must-carry, this number depends on the number of "usable activated channels" on the system:

| System Capacity | Must-carry Channels |
|---|---|
| Up to 20 | 1 Public Station |
| 21-29 | 7 |
| 30-33 | 8 |
| 34-37 | 9 |
| 38-41 | 10 |

Generally, if the cable system has enough must-carry channels to handle all eligible stations, it must carry them all. But if there are more eligible stations than channels, the cable operator is free to choose which ones to carry on the must-carry channels and is free to not carry the rest. The number of must-carry channels is simple the maximum number of local signals he must be willing

to carry although he is free to carry more if he wishes. All cable systems must carry at least one public TV station or translator, assuming there is a public station in the eligible pool, and systems with 54 or more channel capacity must carry at least 2 public stations, again assuming there are eligible stations.

In drafting the new regulations, the FCC determined that its narrowly drawn interim rules are consistent with the First Amendment rights of cable operators. While recognizing that any must-carry rules intrude on the editorial discretion of cable operators, the commission concluded that the rules meet the O'Brien test employed by the Quincy court.[60] In this regard, the commission noted that the interim must-carry rules are considerably narrower in scope than the former rules, are less intrusive on cable operators' editorial discretion, account for viewer preference, and apply for a minimal length of time. In short, they are narrowly tailored to meet the specified governmental objective. The commission explicitly found that the record does not support the imposition of must-carry rules that are broader in scope and of longer induration than those adopted.

Consistent with the commission's desire to craft rules that are no broader than necessary, the interim must-carry rules will automatically expire in five years from the effective date of this

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[60] In Quincy, the court suggested that the stricter constitutional test established by the Supreme court in Miami Herald v. Tornillo might be properly applied to analyze must carry regulations. Noting that this is an important, but as yet unresolved constitutional issue, the commission decided that for purposes of this decision, it would apply the same standard as used by the Quincy court.

Report and Order. The Commission stated, however, that prior to the expiration of the five year period, it would initiate and conclude a rule-making proceeding to determine if there exist particular situations where mandatory carriage rules might continue to be necessary.

Will the new must-carry rules eventually hurt public television? A review of the public television system, in general, and its financial picture, in particular, may illuminate this question.

## Financing Public Television: A Brief Survey

The FCC recognized the importance of public television early. When the FCC established the overall licensing design of the country in 1952, it created a special class of educational license, and set aside--for its exclusive purpose--nearly one-fifth of all channels assigned to communities around the country.[61] A significant development in the history of radio and television broadcasting was the passage of the Public Broadcasting Act of 1967.[62] With the adoption of the Act, the Commission became responsible for regulating a new breed of broadcasting service--the public television system.

Public television was conceived by the Carnegie Commission in conjunction with the Ford Foundation. In January, 1967, Carnegie Foundation under the chairmanship of Dr. James R. Killian,

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[61]Sixth Report and Order on Television, 141 FCC 140 (1962).

[62]Sydney Head/Christopher Sterling, Broadcasting in America, (Houghton-Mifflin: Boston 1972) p. 261, P.L. 90-129, 81 Stat. 265 (1967).

Jr, recommended the development of a non-commercial television system.[63] The Carnegie Report, called Carnegie I, provided much of the impetus towards governmental financed public broadcasting of 1967 and helped secure the passage of the Public Broadcasting Act.[64] That statute provided funding for a programming connection system and other services which Congress found were necessary to realize the potential benefits of noncommercial broadcasting. Since that Act was passed, Congress has provided financial support. And as recently as last year, President Reagan recommended that Congress authorize sums approaching $300 million for its support.[65]

The Act also created the Corporation for Public Broadcasting (CPB), radio was added prior to adoption, as a non-governmental agency. To become certified by CPB a station had to possess an FCC non-commercial educational license, the appropriate facilities for local program origination, and a regular schedule of local programming. In addition, certain minimum requirements concerning air time and size of staff had to be met. Certification under the CPB was limited to one station in an area. If there was a

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[63] Broadcasting in America (Houghton-Mifflin: Boston, 1972) at 261.

[64] Joint Petition for Rulemaking of the Corporation for Public Broadcasting, the National Association of Public Television Stations and the Public Broadcasting Service filed with the Federal Communication Commission. Washington, D.C. on October 15, 1985. 47 U.S.C. § 396 (g)(1)(A).

[65] Broadcasting in America at 261.

given population reached by two stations, each station had to show that it was broadcasting to a sizable, otherwise unreached population.[66]

In 1970 the CPB formed the Public Broadcasting Service (PBS)--an association for public broadcasting stations and public programs.[67] It was formed as an instrument through which the local stations could work in close collaboration with CPB, but removed from the Federal funding source. PBS, despite its name, had as its only real responsibility the operation of the interconnecting of the facilities of public television stations.

The basic structure that developed from 1967-70 from the Carnegie I report and subsequent legislation has survived for more than fifteen years, though with some important changes in detail. Initially, the primary role of public television and its network organization provided a central source of disagreement. The Carnegie I report had stressed the importance of having interconnection system, but at the same time the Report emphasized that it should have a centralized source for programming similar to commercial networks.[68] Public television was to differ from commercial television broadcasting in having "a strong component

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[66]47 U.S.C § 396 K assures that most of the CPB's operating budget be derived through the congressional appropriation process.

[67]Broadcasting in America at 261 (1972).

[68]CCET (Carnegie Commission on Education Television) 1967. Public television A Program for Action. (Harper and Row: New York) at 33.

of local and regional programming."[69] The Report proposed that public television "would provide an opportunity and means for local choice to be exercised upon programs made available from central sources."[70] Carnegie I stressed the importance of stations picking and choosing among offerings the loosely-connected network offered, recording them, and then making up their localized program schedules.[71] Unfortunately, opponents of a strong PBS used the Carnegie Commission's localism doctrine as justification for dividing public television stations into opposing groups. Finally, in 1973, when members of Congress refused to provide funding until public broadcasting's internal squabbles were resolved, leaders of CPB and PBS hammered out an agreement which defined the duties and responsibilities of both CPB and PBS.[72] PBS was given responsibilities for the management and editorial judgments decisions for the system. CPB was given responsibilities as the major program funder. CPB, in turn, granted economic power to the stations by giving them control of half of the federal funds granted to the system.

During the next few years, there were a series of disagreements between CPB and PBS. These problems included disagreements concerning the national decision making orientation of CPB versus the local decision-making of PBS, and the role of public

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[69] Id.

[70] Id.

[71] Id.

[72] Id.

broadcasting; but the most important problem was funding. Who was to get the money? How much money would be received? For what purpose the money should be spent? And other accountability problems were constantly being disputed by the organizations. The only agreement between the groups appeared to be the fact that public broadcasting needed more money. In 1976 the Carnegie Foundation established another task force to analyze the structure and operation of public broadcasting. A Commission was established; and after eighteen months, a report was issued. The Report which appeared in January, 1979 was entitled, A Public Trust, (referred to as Carnegie II), called for:

> - Abolition of CPB and its replacement with a Public Telecommunication Trust to guide and maintain the overall system
> - Improvement of aural service of the National Radio (NPR) by activating an additional 250-300 qualified station
> - Greater interest in funding and the adoption of new technologies to supplement broadcasting, and;
> - A three-fold increase for funding of public broadcasting, with sharp increase in funding from other sources to a total of 1 to 2 billion by 1985[73].

Unfortunately, Congress was not in the mood to readily accept all of these proposals, especially an increase of public expenditures. At the time, a rewrite of the Communication Act 1934 was lodged in the House Communications Sub-committee.[74] The Committee efforts, would of course affect public broadcasting and the proposals were delayed. But, many of the Carnegie II proposals found their way into the Congressional legislation concerning

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[73]CCET at 33 (1979).

[74]Broadcasting in America at 261.

public television. However, the proposals' failure to be passed when proposed in 1979 eased the immediate pressure for structural changes for public television organizations. But the problem of the financing of the system still persisted.

There was, however, a change within public broadcasting. PBS reorganized along service lines, and spun off station representative responsibilities. CPB split into two independent parts, one dealing with programming and the other with funding. Public television's most serious problem, funding, still existed after this reorganization.

> No one will be surprised with the statement that financial support remains educational television's greatest single problem. Inadequate funding has made it necessary to cut corners in operation, to eliminate everything but the bare essentials and even to compromise with program quality.[75]

After much squabbling, Congress attempted to solve this problem with the Public Broadcasting Act of 1975.[76] The Act authorized funds for five years, although funds for three years were actually appropriated.[77] It was based on a matching fund principal. Congressional money would be released at a ratio of $1.00 for each $2.50 raised by the public broadcasting system from other than Federal sources.[78] The legislation also called for half the money accruing to CPB to pass through that organization

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[75]Public Participation in Public Broadcasting, Report of the CPB Task Force in Participation in Public Broadcasting, August 1978.

[76]Id.

[77]Id.

[78]Id.

directly in the form of unrestricted grants to use as it saw fit. Three years later, Congress approved a follow-up bill, the Public Telecommunications Act of 1978,[79] which carried funding authorization through 1983. The 1978 Act called for greater public participation in local stations operations and imposed a ceiling for the salaries of public television officials. The match provision was revised to $1.00 of funds for every $2.00 of non-Federal funds.[80]

The public broadcasting funding legislation has meant that public broadcasting has had to seek financial input from all possible sources in order to survive. In constant search for funds to meet the federal "match" public broadcasting stations have had to push membership drives to the saturation point.[81] On the air auctions, corporate underwriting, sale of commercial materials from public television programs, production of limited audience specialty interest programming for distribution and retail of station facilities to commercial producers are all ways of paying for public television.[82] Despite these difficulties, today public television reaches 97% of the population and is used each week by nearly 100 million Americans.[83] Some 18,500,000 school children rely on their local public television stations for daily classroom instruction; and nearly 300,000 adults and

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[79]Id.

[80]Public Broadcasting Act of 1981, 47 U.S.C. § 399

[81]Joint Petition at 10 (1985).

[82]Id.

[83]Id.

continuing education students use public television's course work programs for credit.

> In those communities fortunate to have and be able to support one public station, public television strives to provide high differentiated programs in order to be the true, quality alternative that the public expects. Public television is local television, serving as many needs of each community as it can. This has been demonstrated time and again in many studies conducted over the past few years.

Given the financial structure and financial problems inherent in funding public broadcasting, the loss of cable carriage looms as a serious problem facing the industry. Virtually all public television stations are dependent upon viewer contributions for support.

For public television, cable carriage is particularly important because more than 60% of public television stations operate in the UHF band and almost all (95%) of the remaining public television stations to be constructed in the future will be UHF facilities.[84]

The National Association of Public Television Stations studied cable carriage of public stations nation-wide and found that almost 95% of all cable systems carry two or fewer public signals.[85] Further, the study showed that cable carriage of multiple public stations occurred on cable systems with large channel capacity. As to the smallest cable systems (13 channels or fewer), 90% carry only one or no public stations.[86]

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[84]NAPTS Statement.

[85]NAPTS News Release .

[86]Id.

CHART I

Headend Cable Channel Capacity By PTV Carriage: All U.S.
PTV Station Carriage

| Channel Capacity | # Of Head-ends | # Of Total | 0 | 1 | 2 | 3 | 4+ |
|---|---|---|---|---|---|---|---|
| §13 | 1,979 | 26.79% | 285/14.4% | 1,489/75.2% | 202/10.2% | 3/.2% | 0 |
| 13-24 | 1,572 | 21.28% | 75/4.8% | 1,188/75.6% | 296/18.8% | 13/.8% | 0 |
| 25-36 | 3,004 | 40.66% | 118/4% | 1,980/65.9% | 706/23.5% | 128/4.3% | 72/2.4% |
| 37+ | 832 | 11.25% | 13/1.6% | 389/46.8% | 234/28.1% | 119/14.3% | 77/9.3% |
| Totals | 7,387 | 100% | 491/6.6% | 5,046/68.3% | 1,438/19.5% | 263/3.6% | 149/2.0% |

Source: A. C. Nielsen Co.

The new must-carry regulations will and have resulted in a reduction in the number of cable systems who carry public television stations. Without the protection of the suspended must-carry regulations, cable systems are no longer legally obligated to carry these stations.[87] PTV carriage was not a channel capacity burden to cable; CATV carriage of multiple PTV occurs on CATV headends with large channel capacity. It also fostered the Commission's previous goals of promoting localism.

[87]Prior must-carry requirements had required in 47 CFR § 73.683 c and 47 CFR § 76.65 that a cable system must carry the signal of a non-commercial educational television broadcast station (i.e., a "public television" station) within whose Grade B contours the community of the community unit is located in whole or in part. A "Grade B" contour is a line on a map connecting points of equal signal strength broadcast from a television transmitter. Reception within this perimeter is expected to meet or exceed a technical standard established in the Commission's rules. This contour is larger than the 35 mile radius of a commercial television station.

In fact, in 1984, of the 40,000 cable channels used to retransmit TV signals, PTV represented the lightest channel load for cable.[88]

| Signal Type | Percent of Total |
|---|---|
| Networks | 58 |
| Inds. | 28 |
| PTV | 17 |

As of February 1, 1987, 170 cable systems in 34 states have dropped public television stations.[89] Therefore, it is most likely that the Commission's action in adopting new must-carry regulation will continue this trend of public television stations being dropped, to the detriment of the public these stations serve.

The Impact of Cable on Public Broadcasting

Over the past few years, various studies have been conducted on the impact of cable systems on public television stations. Two examples are The Impact of the Cable Industry on Public Television by David and Judith Leroy (1983) and Cable television's Impact on the Audience of Public Television by Don Augustino (1979).[90] These surveys, like most others, have predicted a dependence on cable by

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[88]NAPTS News Release.

[89]Id. February 1, 1987. Of the 170 drops, 12 are anticipated. This action will effect 3 million subscribers.

[90]David J. Leroy and Judith M. Leroy, The Impact of Cable Television Industry on Public Television. Corporation of Public Broadcasting, Washington, D.C. 1983 p. 77.

public broadcasting. In fact, one such study was funded about ten years ago by the Sloan Foundation.[91] This study and others predicted the advent of a nation filled with an abundance of cable channels promising something for everyone. However, the Reagan administration broadcast deregulation philosophy and simple cable economics helped to hinder these predictions.

During the 1970's, the conglomerates of big business acquired cable systems e.g. Westinghouse, Cox, and Warner; and the concentration of ownership of the industry began.[92] By 1986, there were approximately 7546 different cable systems in America, with about 36,932,518 subscribers.[93] Today there are approximately 1,712 of the cable systems have fewer than 12 channels. Moreover, the number of cable households continues to grow rapidly. In the five years since cable became a serious factor in television programming, cable subscription has more than doubled, and cable penetration is a significant factor in television viewership[94] (see Charts II and III).

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[91] Id.

[92] Cable TV Programming News Roundup, November 25, 1986, at 1.

[93] Television and Cable Factbook, 1986 Edition Vol. 54 at A-45.

[94] Id.

CHART II
ESTIMATE GROWTH OF THE CABLE INDUSTRY
(as of January 1 of each year)

| Year | Operating Systems | Total Subscribers | Year | Operating Systems | Total Subscribers |
|---|---|---|---|---|---|
| 1952 | 70 | 14,000 | 1969 | 2,260 | 3,600,000 |
| 1953 | 150 | 30,000 | 1970 | 2,490 | 4,500,000 |
| 1954 | 300 | 65,000 | 1971 | 2,639 | 5,300,000 |
| 1955 | 400 | 150,000 | 1972 | 2,841 | 6,000,000 |
| 1956 | 450 | 300,000 | 1973 | 2,991 | 7,300,000 |
| 1957 | 500 | 350,000 | 1974 | 3,158 | 8,700,000 |
| 1958 | 525 | 450,000 | 1975 | 3,506 | 9,800,000 |
| 1959 | 560 | 550,000 | 1976 | 3,681 | 10,800,000 |
| 1960 | 640 | 650,000 | 1977 | 3,832 | 11,900,000 |
| 1961 | 700 | 725,000 | 1978 | 3,875 | 13,000,000 |
| 1962 | 800 | 850,000 | 1979 | 4,150 | 14,100,000 |
| 1963 | 1,000 | 950,000 | 1980 | 4,255 | 16,000,000 |
| 1964 | 1,200 | 1,085,000 | 1981 | 4,375 | 18,300,000 |
| 1965 | 1,325 | 1,275,000 | 1982 | 4,825 | 21,000,000 |
| 1966 | 1,570 | 1,575,000 | 1983 | 5,600 | 25,000,000 |
| 1967 | 1,770 | 2,100,000 | 1984 | 6,200 | 29,000,000 |
| 1968 | 2,000 | 2,800,000 | 1985 | 6,600 | 32,000,000 |
| 1969 | 2,260 | 3,600,000 | 1986 | 7,600 | 37,500,000 |

Source: Television and Cable Fact Book, 1986 Edition, Vol. 54 at A-45.

CHART III
CABLE PENETRATION

| | A. C. NIELSEN COMPANY NOVEMBER 1986 | ARBITRON TELEVISION FALL 1986[a] | PAUL KAGAN ASSOCIATES INC. NOVEMBER 30, 1986[b] | TELEVISION DIGEST DECEMBER 1986[c] |
|---|---|---|---|---|
| BASIC CABLE HOUSEHOLDS | 42,237,140 | 41,776,700 | 37.908 MILLION | |
| U.S. TELEVISION HOUSEHOLDS[d] | 87,896,350 | 87,614,900 | 86.917 MILLION | |
| PENETRATION: BASIC CABLE TO TELEVISION HOUSEHOLDS | 48.1% | 47.7% | 44% | |
| HOMES PASSED BY BASIC | | | 67.085 MILLION | |
| PENETRATION: HOMES PASSED TO TELEVISION HOUSEHOLDS | | | 77% | |
| PENETRATION: BASIC TO HOMES PASSED | | | 57% | |
| PAY CABLE UNITS | | | 31.819 MILLION | |
| PENETRATION: PAY TO BASIC | | | 84% | |
| EXPANDED BASIC HOUSEHOLDS | | | 6.404 MILLION | |
| HEADENDS | 9,996[e] | | | |
| SYSTEMS | | | | 7,737 |

[a]Revised figures (released December 1986).

[b]Cable TV Programming, News Roundup, November 25, 1986 p. 1.

[c]1987 estimates; Arbitron estimate for continental U.S. only.

[d]1987 estimates; Arbitron estimate for continental U.S. only.

[e]As of November 21, 1986; Nielsen CODE (Cable On-Line Data Exchange) database.

Some experts believe that between 80-90% of all American homes will have cable by the end of the decade.[95] By 1990 nearly three-fourths of American households may pay to receive additional programming choices regardless of how it is delivered. Therefore, in the future, public television will have to compete with various forms of media common carriers, e.g. microwave, direct broadcast satellites, plus the three major networks for a share of the nation's television audience.

America's population is geographically concentrated in large urban areas. In 1986, approximately 40 percent of all American households were located in the top ten (10) markets.[96] The following are the cable penetration level for these markets as of February, 1986:[97]

| | |
|---|---|
| New York | 38.2% |
| Los Angeles | 36.2% |
| Chicago | 27.9% |
| Philadelphia | 45.4% |
| San Francisco | 48.9% |
| Boston | 49.1% |
| Detroit | 34.6% |
| Washington | 29.5% |
| Dallas/Fort Worth | 38.2% |
| Cleveland/Akron | 44.7% |

Among these markets, four of the ten major public television stations are on UHF.[98] While the cable penetration varies dramatically in each market, there is little doubt that by wiring

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[95] Id. at 1 (1986).

[96] Id.

[97] 1986 Cable Facts at 4.

[98] Joint. Petition at 10.

the suburban areas of these urban centers, cable has helped the UHF stations by giving them a form of signal parity on the cable system. Since 60% of all television stations are on the UHF band, signal parity is very important.[99] When cable is a significant factor in all markets, public television will have an increasing a problem of reaching signal parity in terms of an accessible broadcast signal in all neighborhoods. Given the fact that more than one-half of television households now subscribe to and receive television via cable, the dependence of public broadcasting on cable is apparent.[100]

Cable systems sit as the gatekeepers to over fifty percent of the television households in the country and in some markets cable penetration is substantially higher. Conceptually, public television broadcasters should be able to reach their audiences directly over-the-air. However, the practical reality is that any decision by a cable operator not to carry the signal of a public television station effectively cuts that station off from the cable subscribers and places it at a marked disadvantage in attempting to reach its audience. Since cable operators' decision as to which signal they will carry is motivated by their economic interests rather than the public interest, policies supporting public television mandatory carriage rules were needed to assure that local public stations

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[99] Id.

[100] Id.

were able to "reach their natural audience markets" and serve the audience which the Commission and Congress intended the station to serve.[101]

The effect of cable on public television is more important in terms of the financial stability of public broadcasting. Preliminary figures for fiscal year 1984 indicate that 20.2% of public television's total revenue came from its members.[102] Membership funding was the second largest source of funding for public television broadcasting in that year and the membership income has climbed by 192.4% since 1968, making it the fastest growing source of public television's total revenue.[103] By contrast, total governmental contribution to public television from federal, state and local governments have increased by only 17% in the same period.[104] A decline in viewer contributions also effects a station level of funding from CPB under its matching principle.[105]

The FCC has acknowledged the unique character of non-commercial, educational television. But, the Commission may nonetheless have failed to adequately protect the public's right to diverse public television services or to assure the availability of those services to the public. If the recent actions of some local cable systems of dropping public television stations is any indication, these

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[101] Id.

[102] Id.

[103] Id.

[104] Id.

[105] Id.

instances are significant since they all come in a period when the cable industry's own leadership have urged a "go-slow" attitude with cable system operators regarding drops. More and more public television stations will go out of business.106 Certainly, it is cause for alarm that the commission itself predicts the loss of audience reach and cable carriage of many public television stations as a result of its new regulations.107

Conclusion

The decision to scuttle the must-carry rules came from a court that was strong on theory and First Amendment law but naive about the workings of the communication business. The court reasoned that cable systems were not monopolies because they have competition--not only from direct-broadcast satellites (DBS) and Multichannel Multipoint Distribution Services (MMDS), but also from other cable companies that are free to come and build competing systems where cable exists. But that is simply not the reality of current cable franchising system, nor cable's hold on the television broadcasting system. It is simply not economically feasible to construct a second cable operation in a community. For example, there is simply no more room for another cable system in the Lansing-East Lansing area. The market will simply not bear it. Continental Cable and United Cable have geographic monopolies. Therefore, the Court in the Quincy decision has turned cable

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106NAPTS News Release, .

107Id.

systems, in every community, into defacto monopolies with the power to bury any local television station, especially public television stations.

Contrary to the court's assumption in Quincy and FCC's assumption in adopting its new regulations, the availability of an A/B switch will not provide a viable alternative given public television's dependence on UHF channels since homes equipped with A/B switches may not be able to receive an adequate over-the-air signal even if they are within the station's service contour. Moreover, as the Commission previously concluded the most important component in assuring adequate UHF reception is the adequacy of the receiving antenna systems, and subscribers of cable services are unlikely to incur the costs of purchasing their own antennas given the fact that subscribers to cable are already receiving quality reception.[108] Further, cable subscribers who disconnect their antennas in order to have cable will fail to install or maintain antennas or employ "cable ready" television sets because they are dependent on cable systems for quality reception. The A/B switch is also not a reasonable alternation. A primary reason for the promulgation of cable must-carry requirements was that once a television is hooked up to a cable television system, the cable operator has total discretion to decide what is delivered to that household. The Commission felt that cable operator's had a potential to harm local broadcasting. This premise is as true today as it was in

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[108] Id.

1966 when the rules were adopted.[109] Once hooked to a cable system, the viewer does not have the option to reach elsewhere for alternative programming, even with the A/B switch he probably will not try.

Allowing cable operators to pick and choose which public television station they will carry will undermine the community-based television system. Congress, from the outset of public television, has insisted that the system be built on strong local public television stations with programming directed toward the needs of their local communities. The new regulations will reduce the ability of individual public television stations to survive. Failure to promulgate a mandatory "must-carry" requirement for public television will also deprive the public of the program diversity which the system already offers and is mandated by Congress to expand. The local public television station has a unique function in our national system of disseminating news, information, and entertainment programming. The existing system did not develop without set national priorities. Local television, as we know it today, developed as a result of the FCC's statutory mandate to make television service available to United States citizens. Localism in television provides all people with a mix of local, regional and national programming, as well as a mix of entertainment, news, information, public affairs, and other programming. This combination of programming includes as emphasis on local area news

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[109]See UHF Television REception, Notice of Inquiry and Notice of Proposed Rulemaking Gen. Dkt. No. 78-391, 40 Fed. Reg. 70,023 (1987).

and information and public affairs especially attuned to the needs and interests of the community.

The effective date of the new regulations has been stayed. Therefore, the effect of the new must-carry rules on public television is, at this point, unpredictable. However, given the growth of and penetration of the cable television industry (See Charts II and III) and the dependence of public television on this industry (See Chart I), for signal retransmission its effect may be disastrous.